

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.300 OF 2007
IN
SUIT NO.286 OF 1981

Jamshed Kawasjee Vakeel & Anr. ... Plaintiffs

Vs.

Bennett, Coleman & Co. Ltd. & Anr. ... Defendants

Mr. Sharan Jagtiani with Mr. K. Merchant i/b M/s. Apex Law Partners for the plaintiffs.

Mr. Sandeep Parikh i/b M/s. Kanga & Co. for defendants 1 and 4.

CORAM : SMT. RANJANA DESAI, J.

**DATE ON WHICH THE JUDGMENT
RESERVED : 6TH SEPTEMBER, 2007.**

**DATE ON WHICH THE JUDGMENT
PRONOUNCED : 4TH OCTOBER, 2007.**

JUDGMENT:-

1. This notice of motion is taken out by defendants 1 and 4 under Order XXV Rule 1 of the Code of Civil Procedure, 1908 (for short, "the CPC") praying that plaintiff 1 be ordered to furnish

security for the payment of all costs incurred and are likely to be incurred in defence of the instant suit.

2. The suit is filed by the plaintiffs for damages to the tune of Rs.10,00,000/- together with interest thereon at 12% per annum from the date of the suit till payment. The case of the plaintiffs appears to be that on account of defamatory news article published by the defendants, the business of the plaintiffs came to a standstill in 1980. He suffered loss of reputation. He suffered harm, injury and prejudice and, hence, he is entitled to damages.

3. The case of defendants 1 and 4 as set out in the affidavit in support of the notice of motion is that plaintiff 1 claims to be a director of plaintiff 2-company which has been wound up. The defendants are relying on the statement made by the learned counsel for the plaintiffs which is recorded by the learned Single Judge of this court in her order dated 7/8/2006 in Notice of Motion No.3733 of 2002 that the liquidator has informed plaintiff 1 that he is not in a position to prosecute the present suit on behalf of

plaintiff 2-company as he is out of funds. It is contended that, therefore, the instant suit is only prosecuted by plaintiff 1. It is the case of the defendants that plaintiff 1 is residing out of India. He does not possess sufficient immoveable property within India. It is the case of defendant 1 that defendant 1 has incurred expense to the tune of Rs.6,56,175/-. It is contended that the plaintiffs' claim against the defendants is frivolous. The suit is filed by the plaintiffs to harass and extract money from defendants 1 and 4. The defendants contend that they have a very good defence and they are likely to succeed in the suit. The defendants have, therefore, prayed that in the aforementioned circumstances, plaintiff 1 be ordered to furnish security for the payment of all costs incurred and likely to be incurred in defence of the suit.

4. Mr. Jagtiani, the learned counsel appearing for the plaintiffs refuted all allegations made by the defendants. He took me to the affidavit in reply filed by plaintiff 1 – Jamshed Kawsjee Vakeel. He submitted that plaintiff 1 is a person of Indian origin and he works in Bombay for gain. Plaintiff 1 possesses immoveable

property and, therefore, provisions of order XXV Rule 1 of the CPC are not attracted to the present case. In support of his submissions, the learned counsel has relied on the judgment of this court in *Mahomed Habibulla Khan v. Aimila Automobile Co., (1930) 32 Bom. L.R. 411*, judgment of the Calcutta High Court in *Sachindra Nath Dutt v. Secretary of State for India & Ors., AIR 1930 Cal 520* and the judgment of the Madras High Court in *Arumugam Chettiar (minor) and Anr. v. K.R.S. Sevugan Chettiar & Anr. AIR (37) 1950 Mad. 779*.

5. In his affidavit in reply, plaintiff 1 has stated that though it is true that he holds a British passport, he is a person of Indian origin. He is residing in India continuously since November, 1987. He has a work permit, a 5 year old valid visa pertaining to stay in India and a permanent account number (PAN) allotted by the Income-tax Department. He has annexed photocopies of the valid work permit, extract from passport showing visa and PAN card.

6. Plaintiff 1 has admitted that at the time of filing of the suit in

1981, he did not have any immovable property in India. According to him, subsequently he has inherited one-half share in immovable property bearing CTS No.1368 of Village Versova, measuring 6573 sq. mtrs. situate at Andheri (West), Mumbai from his father who died on 4/8/1992. He has annexed to the affidavit a copy of the title certificate issued by M/s. Haridas & Co., Advocates. According to him, he is the co-owner of the said property along with his mother.

7. Before dealing with the rival contentions, it is necessary to have a look at Order XXV Rule 1 and 2 of the CPC. The said provisions read thus :

“1. When security for costs may be required from plaintiff. - (1) At any stage of a suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff, for reasons to be recorded, to give within the time fixed by it security for the payment of all costs incurred and likely to be incurred by any defendant :

Provided that such an order shall be made in all cases in which it appears to the Court that a sole

plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of India and that such plaintiff does not possess or that no one of such plaintiffs possesses any sufficient immoveable property within India other than the property in suit.

2. Whoever leaves India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of India within the meaning of the proviso to sub-rule (1)."

8. This Rule fell for consideration of this court in *Mahomed Habibulla Khan's case (supra)*. The plaintiff therein was a resident of Bhopal, a Native State. He had filed a suit against the defendants in respect of certain transaction regarding the purchase of a motor car. He was living in Poona for four years prior to the suit. The defendants took out a chamber summons for an order directing the plaintiff to deposit Rs.1,000/- as security for the defendants' costs under Order XXV Rule 1 of the CPC. It was contended by the defendants that the plaintiff was in British India for temporary purpose i.e. for change of air and that he was not

residing in British India. This court considered the four years long stay of the plaintiff in British India and the fact that he had the same address for a long time and observed that no temporary purpose worth the name has been proved by the defendants. This court distinguished its judgment in Hanif v. Kulsam (1921) 23 Bom. L.R. 1253, by observing that in that case, the plaintiff was a resident of a Native State and came to Bombay only for the purpose of a criminal complaint which he had filed. Hence, he was in Bombay only for a temporary purpose. In the circumstances, in that case the plaintiff therein was ordered to give security for costs under Order XXV Rule 1 of the CPC. It was argued that sometimes hereafter the plaintiffs might leave British India and return to Bhopal or elsewhere. While dealing with this submission, this court observed that Order XXV Rule 1 applies to “any stage of a suit”. It was further observed that if a person leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs, he is then to be deemed to be residing out of British India within the meaning of sub-rule (1) and so the rules protect any

defendant against a plaintiff who plays fast and loose on the point of residence within the jurisdiction. In the circumstances, this court discharged the impugned order passed by the learned judge directing the plaintiff to deposit Rs.1,000/- as security for costs of the defendants.

9. Reference may also be made to the judgment of the Madras High Court in Arumugam Chettiar's case (supra). In that case, the respondents had applied for an order under Order XXV, Rule 1 of section 151 of the CPC directing the petitioners to furnish security for the costs of the suit on the ground that the suit was not a bona fide suit. The learned Judge directed the petitioners to furnish security for the costs incurred. Against that order, revision petition was filed in the High Court. The Madras High Court held that if a suit is not held to be bona fide at the initial stage, that cannot be a ground for holding that the petitioners are liable to furnish security for costs. It was further observed that security for costs can be ordered only under exceptional circumstances, and, it should be an

exception and not the rule and it should be based on some established principles, not on the mere circumstance that the court in its first impression finds a suit as not a bona fide suit.

10. In *Sachindra Nath Dutt's case (supra)* the Calcutta High Court was dealing with somewhat similar provision contained in Order XL Rule 10 of the CPC under which the appellate court can require the appellant to furnish security for costs. On facts before it, the Calcutta High Court observed that the appeal was filed on 14/7/1928 and the application on which the order complained of was made was not put in till 6/2/1929. The Calcutta High Court further observed that if a party to the suit or appeal desires to apply for security for costs, he must do it promptly. Otherwise, the order made on such an application may have the effect of stifling the suit or appeal. The Calcutta High Court in the circumstances, set aside the order requiring the appellant to give security for costs.

11. The principles that emerge from the above rulings are that the order directing the plaintiffs to give security for costs cannot be

passed lightly and for the asking. Exceptional circumstances and sound reasons must be present to persuade the court to pass such an order. Otherwise, in every suit, on some imaginary grounds, a party can pray for order directing the defendant to give security for costs to stifle the suit. Mere residence of the plaintiffs outside India is not sufficient. It must be shown that he does not possess any sufficient immoveable property within India other than the suit property. While considering residence outside India, length of stay in India, the address of the plaintiff, his background and other attendant circumstances may have to be taken into account. Under sub-rule (2) of Order XXV, if a person leaves India to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs, he shall be deemed to be residing out of India within the meaning of the proviso to sub-rule (1). Therefore, if circumstances exist which give rise to such probability, there will be justification for passing such an order. Application praying for an order under Order XXV Rule 1 has to be made as early as possible. A delayed application may be liable to be rejected because it may have the effect of stifling the suit.

12. The above principles can be applied to the present case. The suit is of the year 1981 and the notice of motion is taken out in January, 2007. No explanation is offered by the defendants as to why at a belated stage, they have found it necessary to make this application barring the statement made by the Liquidator which is recorded by this court on 7/8/2006 that he is not in a position to prosecute the suit on behalf of plaintiff 2-company as he is out of funds. But at the same time, it must be remembered that though plaintiff 1 holds a British passport, he is a person of Indian origin and he has a valid work permit and a five year old valid visa pertaining to stay in India and a permanent account number (PAN) allotted to him by the Income-tax Department. In my opinion, as of today, there is no reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs. In the facts of this case, therefore, as of today, he cannot be deemed to be residing out of India within the meaning of the proviso to sub-rule 1. Besides, he has stated on oath that he has inherited one-

half share in immoveable property bearing CTS No.1368 of Village Versova, admeasuring 6573 sq. mtrs. situate at Andheri (West), Mumbai along with his mother. He is in possession of the said property. A title certificate is issued in his favour by M/s. Haridas & Co., Advocates. It is not possible at this stage to pre-judge the issues involved in the suit and give a finding that the suit is false, frivolous and vexatious. In the light of the judgments of this court, the Calcutta High court and the Madras High Court, therefore, in my opinion, this is not a case where any order under Order XXV Rule 1 could be passed directing plaintiff 1 to furnish security for the payment of costs incurred and are likely to be incurred by the defendants.

12. In the circumstances, the notice of motion is rejected.

[SMT. RANJANA DESAI, J.]